

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHRISTOPHER A. SHAFER,

Case No. C20-1056RSM

Plaintiff,

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

V.

C.R. BARD, INC. and BARD PERIPHERAL
VASCULAR, INC.,

Defendants.

I. INTRODUCTION

This matter comes before the Court on Defendants C.R. Bard, Inc. and Bard Peripheral Vascular, Inc.’s Motion for Summary Judgment. Dkt. #27. Defendants move to dismiss certain causes of action that Plaintiff has agreed to withdraw: Count I (Negligence), Count IV (Strict Products Liability – Manufacturing Defect), Count V (Breach of Express Warranty), Count VI (Breach of Implied Warranty), Count VII (Fraudulent Misrepresentation), Count VIII (Negligent Misrepresentation), and Punitive Damages. *See* Dkt. #27. Defendants attach evidence of Plaintiff’s agreement to withdraw these claims, *see* Dkt. #29-23, and Plaintiff does not oppose. These claims will be dismissed. Next, Defendants move to dismiss the remaining two causes of action: Count II (Strict Products Liability – Failure to Warn) and Count III (Strict

1 Products Liability - Design Defects). Plaintiff opposes. Dkt. #49. For the reasons stated
 2 below, the Court finds that these claims are properly dismissed for lack of causation evidence.

3 **II. BACKGROUND**

4 On December 29, 2004, then 17-year-old Christopher Shafer was involved in a serious
 5 car accident. Dkt. #49-29. Plaintiff Shafer sustained injuries to his chest and abdomen and had
 6 to be airlifted to Harborview Medical Center in Seattle. *Id.*, *see also* Dkt. #49-31. Although
 7 successfully treated for his immediate injuries, he was subsequently diagnosed with a
 8 pulmonary embolism (“PE”) in his lower right lung.

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 10 On January 14, 2005, Dr. Sandeep Vaidya implanted a Bard Recovery filter (“Recovery
 11 Filter”) into Mr. Shafer’s inferior vena cava (“IVC”) to mitigate or prevent the PE problem.
 12 Dkt. #29-11; *see also* Dkt. #49-31. Dr. Vaidya described the procedure as a “successful
 13 deployment” and noted that “this type of IVC filter is made to be retrievable, if clinically
 14 desired.” Dkt. #29-11 at 2. Mr. Shafer was discharged from Harborview on January 20 to
 15 continue to heal at home.

16
 17 The Information For Use (“IFU”) pamphlet, presumably sent to hospitals along with the
 18 Recovery Filter, states many warnings, including, “filter fracture is a known complication of
 19 vena cava filters.... Most cases of filter fracture, however, have been reported without any
 20 adverse clinical sequelae.” Dkt. #28-1 at 2. Under “Potential Complications,” the Recovery
 21 IFU warns that “[p]ossible complications include, but are not limited to... Perforation or other
 22 acute or chronic damage of the IVC wall.” *Id.* This section ends with the following, in bold:
 23 “All these above complications have been associated with serious adverse events such as
 24 medical intervention and/or death. The risk/benefit ratio of any of these complications should be
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1 weighed against the inherent risk/benefit ratio for a patient who is at risk of pulmonary
2 embolism without intervention.” *Id.*

3 On April 4, 2019, Mr. Shafer had an x-ray revealing a “[s]mall part of IVC filter found
4 to be fractured off inferiorly to main part.” Dkt. #29-17 at 5. Mr. Shafer was referred to the
5 University of Washington Medical Center. Dkt. #29-19. A CT scan on August 2, 2019,
6 showed “one broken limb seen extending posterior to the IVC likely into a small lumbar vein...
7 some limbs are seen extending beyond the wall of the IVC...” Dkt. #29-20.

8 Mr. Shafer discussed this with his doctor, who agreed to remove the filter. Dkt. #29-19.
9 On August 20, 2019, Dr. Christopher Ingraham successfully removed the Recovery Filter with
10 eleven of its twelve limbs. Dkt. #29-21. No attempt was made to retrieve the limb “left behind
11 ... in the iliac arterial region.” *Id.* at 3.

12 In the coming weeks, Mr. Shafer complained of chest pain and subsequent imaging
13 revealed hyperdensities in his lungs. Mr. Shafer’s physician opined that these “may reflect
14 broken off pieces of the IVC filter rather than calcifications.” Dkt. #29-22. His physician noted
15 that he was merely “speculating whether this . . . material or calcifications could be due to his
16 history of pulmonary thromboembolism and past history of having a IVC filter.” *Id.* His
17 physician ultimately concluded that Mr. Shafer was asymptomatic and did not order any further
18 workup beyond regular monitoring. *Id.*

19 Mr. Shafer has testified in deposition that he experienced anxiety and stress thinking
20 about the fact that he had a defective filter, starting from the day that he became aware of the
21 situation in April of 2019. *See* Dkt. #29-24 (“Plaintiff Dep.”) at 29:13-30:1. However, he has
22 not sought any medical treatment for these symptoms. *Id.* at 14:17-21.

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27 Mr. Shafer filed this action on January 8, 2020. Dkt. #1.
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In the course of this litigation, Mr. Shafer's expert, Dr. Allen, reviewed the medical records and concluded that it was not possible with any medical certainty to say that the filter caused Mr. Shafer's chest pain or subclinical pulmonary embolisms, and that "it's just one of those things that we just don't have objective evidence [for]." *See* Dkt. #29-16 ("Allen Dep.") at 54:10–55:21. Claims of abdominal pain likewise lack medical certainty from Dr. Allen. *See id.* at 22:8–12 and 48:4–5.

III. DISCUSSION

A. Legal Standard for Summary Judgment

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248. In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)).

On a motion for summary judgment, the court views the evidence and draws inferences in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v. U.S. Dep't of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). The Court must draw all reasonable inferences in favor of the non-moving party. *See O'Melveny & Meyers*, 969 F.2d at 747, *rev'd on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a “sufficient showing on an essential element of her case with respect to which she has the burden of proof” to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

B. Failure to Warn Claim

The only remaining claims are product liability failure to warn and defective design claims. In Washington, these claims are governed by the Washington Product Liability Act, RCW 7.72 *et seq.* RCW 7.72.030(1) provides that a manufacturer is “subject to liability to a claimant if the claimant’s harm was proximately caused by the negligence of the manufacturer in that the product was . . . not reasonably safe because adequate warnings or instructions were not provided.” Under the WPLA, warnings are inadequate:

if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.

RCW 7.72.030(1)(b). Mr. Shafer cites this subsection, but also cites RCW 7.72.030(1)(c):

A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured. In such a case, the manufacturer is under a duty to act with regard to issuing warnings or instructions concerning the danger in the manner that a reasonably prudent manufacturer would act in the same or similar circumstances. This duty is satisfied if the manufacturer exercises reasonable care to inform product users.

See Dkt. #49 at 12; *see also Thongchoom v. Graco*, 117 Wash. App. 299, 306-07, 71 P.3d 214, 219 (2003) (“A postsale duty to warn arises after a manufacturer has sufficient notice about a specific danger associated with the product.”). Defendants argue that a claim brought under (1)(c) is not a strict liability claim but a negligence claim, and that therefore it was withdrawn by Mr. Shafer. *See* Dkt. #61 at 2 (citing *Guerrero Apodaca v. Eaton Corp.*, No. C20-1064-JCC, 2020 WL 6799007, at *4 (W.D. Wash. Nov. 19, 2020)). Examining the evidence submitted by

1 Defendants, as well as the difference between claims brought in the original Complaint, the
2 Court concludes that Mr. Shafer has withdrawn all claims other than strict liability failure to
3 warn and defective design, and that a claim under RCW 7.72.030(1)(c) is a negligence claim
4 that lines up with Mr. Shafer's First and possibly Eighth Causes of Action, which were
5 withdrawn.
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7 The Court will thus stick to RCW 7.72.030(1)(b). Under the "learned intermediary"
8 doctrine, a medical device manufacturer satisfies its duty to warn of dangers involved in using
9 its product if the manufacturer "gives adequate warning to the physician who prescribes it."
10 *Terhune v. A.H. Robins Co.*, 577 P.2d 975, 977 (Wash. 1978); *see also Adams v. Synthes Spine*
11 *Co., LP.*, 298 F.3d 1114, 1117 (9th Cir. 2002) (citing *Terhune* and explaining that, "[u]nder
12 Washington law, the 'consumer' of a prescription-only medical device such as this is the
13 physician, not the patient"). The adequacy of the warning provided to the prescribing physician
14 may be assessed within either the risk-utility or consumer expectation test. As to the former,
15 "the trier of fact must balance the likelihood that the product would cause the harm complained
16 of, and the seriousness of that harm, against the burden on the manufacturer of providing an
17 adequate warning." *Ayers v. Johnson & Johnson Baby Products Co.*, 818 P.2d 1337, 1346
18 (Wash. 1991). As to the latter, "the trier of fact shall consider whether the product was unsafe to
19 an extent beyond that which would be contemplated by the ordinary user"—the prescribing
20 physician. RCW 7.72.030(3); *O'Connell v. MacNeil Wash Systems Ltd.*, 409 P.3d 1107, 1115
21 (Wash. Ct. App. 2017) ("The consumer expectation test is more direct. Under this test, the
22 plaintiff must show the product was more dangerous than the ordinary consumer would
23 expect.").

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1 Here, Defendants argue that the Instructions For Use (“IFU”) sent to hospitals with the
 2 Recovery Filter warned about the very risks that Mr. Shafer experienced: perforation and
 3 fracture. The Recovery IFU contains two relevant sections: “E. Warnings” and “G. Potential
 4 Complications.” Dkt. #28-1. Under “Potential Complications,” the Recovery IFU warns that
 5 “[p]ossible complications include, but are not limited to . . . Perforation or other acute or
 6 chronic damage of the IVC wall.” *Id.* at 2. Both the “Warnings” and “Potential Complications”
 7 sections warn that, “Filter fracture is a known complication of vena cava filters.” *Id.*
 8 Defendants argue that “[n]o reasonable prescribing physician apprised of the label’s contents
 9 would be unaware of the risk[s]” of perforation or fracture. Dkt. #27 at 12 (citing *Falsberg v.*
 10 *GlaxoSmithKline, PLC*, 176 Wn. App. 1019, 2013 WL 4822205, *4 (Sept. 9, 2013)).
 11

12 The Court disagrees with Bard that this issue can be ruled on as a matter of law. Mr.
 13 Shafer has pointed to genuine disputes of material fact related to the adequacy of these warnings
 14 and the question of whether no reasonable physician could be unaware of the risks associated
 15 with *this* filter based on one or two sentences contained in the IFU. Mr. Shafer presents at least
 16 some evidence as to what Defendants could have provided in the warnings or instructions that
 17 would have been adequate. *See* Dkt. #49 at 14. This Court finds that it is a question of fact
 18 whether such warnings would have been reasonable or adequate.
 19

20 **C. Design Defect Claim**

21 Defendants point to Comment k to the Restatement (Second) of Torts § 402A, arguing it
 22 applies to medical product WPLA cases:
 23

24 There are some products which, in the present state of human
 25 knowledge, are quite incapable of being made safe for their
 26 intended and ordinary use. . . . The seller of such products, again
 27 with the qualification that they are properly prepared and
 28 marketed, and proper warning is given, where the situation calls
 for it, is not to be held to strict liability for unfortunate

1 consequences attending their use, merely because he has
 2 undertaken to supply the public with an apparently useful and
 3 desirable product, attended with a known but apparently
 4 reasonable risk.

5 Defendants argue that, in the absence of a manufacturing defect (improper preparation) or
 6 inadequate warnings (improper marketing or warnings), manufacturers of medical devices are
 7 not to be held liable for injuries attending the use of such products. Dkt. #27 at 15 (citing
 8 *Taylor*, 389 P.3d at 527). However, as the Court has found that inadequate warnings remain an
 9 issue for the jury, the Court cannot conclude as a matter of law that Comment k precludes a
 10 design defect claim.

11 **D. Causation Issues**

12 Finally, Defendants assert that “Plaintiff’s WPLA claims fail because he has not
 13 presented any reliable expert testimony showing that any alleged defects of the Recovery
 14 Filter’s design or warnings proximately caused his injuries.” Dkt. #27 at 17. Under RCW
 15 7.72.030(1), it is Mr. Shafer’s burden to prove his “harm was proximately caused by the
 16 negligence of the manufacturer in that the product was not reasonably safe as designed or not
 17 reasonably safe because adequate warnings or instructions were not provided.” “Expert
 18 testimony is required to establish causation when,” as here, “an injury involves obscure medical
 19 factors that would require an ordinary layperson to speculate or conjecture in making a finding.”
 20 *Bruns v. PACCAR, Inc.*, 890 P.2d 469, 477 (Wash. Ct. App. 1995). Such testimony must
 21 establish the defect “more probably than not” caused Plaintiff’s injuries, and testimony that an
 22 alleged defect “may, might, could or possibly” have caused Plaintiff’s injuries “does not
 23 provide enough guidance to the jury to remove the decision-making process from speculation
 24 and conjecture.” *Id.* Additionally, the testimony must be based on a reasonable degree of
 25 medical certainty. *McLaughlin v. Cooke*, 774 P.2d 1171, 1176 (Wash. 1989).

1 Defendants' Motion argues that Plaintiff's expert, Dr. Allen, "cannot say within a
 2 reasonable degree of medical certainty, that Plaintiff's chest pain was attributable to an
 3 allegedly defective aspect of the Recovery Filter." Dkt. #27 at 18. The transcript of Dr. Allen's
 4 deposition contains speculation and conjecture as to the Recovery Filter causing this symptom,
 5 as well as abdominal pain. Such cannot serve as a basis for WPLA claims. Dr. Allen appears to
 6 admit that he cannot connect the dots for these symptoms for this Plaintiff.
 7

8 Mr. Shafer is also claiming damages for the anxiety and emotional distress of knowing
 9 he had a fractured filter inside his IVC. Defendants argue that "[l]ike Plaintiff's physical
 10 symptoms, Dr. Allen offered no opinion reliably tying these psychological symptoms to any
 11 particular defect in the design of the Recovery Filter or its warnings." *Id.* at 20.
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13 In Response, Mr. Shafer fails to rebut any of Defendants' arguments on causation.
 14 Instead, Mr. Shafer argues he can rely on the opinions of Dr. McMeeking, a general expert from
 15 the MDL. However, Dr. McMeeking has not opined on this Plaintiff's individual injuries. The
 16 Response brief completely fails to address Mr. Shafer's alleged injury of anxiety or stress.
 17

18 On Reply, Defendant sums up the situation:

19 Bard does not dispute that Plaintiff's Recovery Filter perforated his
 20 IVC and fractured. (ECF No. 27 at 6.) Bard's contention, with
 21 which Dr. Allen agrees, is that the possibility of these
 22 complications occurring is inherent to all filters and would not
 23 necessarily have been avoided with a different filter. (ECF No. 29-
 24 16 at 134, 150.) Moreover, and wholly unaddressed in Plaintiff's
 25 opposition, Dr. Allen fails to make a causal connection stemming
 26 from a specific defect of the Recovery Filter to any filter
 27 complication and then to a specific injury. (ECF No. 27 at 17-20.)
 28 Notwithstanding Dr. Allen's cursory adoption of Dr. McMeeking's
 29 design defect opinions, (ECF No. 29-25 at 10), a review of his
 30 testimony shows that the record is devoid of any expert testimony
 31 raising a genuine issue of material fact as to a causal connection
 32 between alleged defects in either the design of or warnings
 33 accompanying Plaintiff's Recovery Filter and his injuries.

1 Dkt. #61 at 11. Without an expert witness able to testify with a reasonable degree of medical
2 certainty that the Recovery Filter more probably than not caused the alleged injuries, the case
3 cannot proceed. Dr. Allen has testified that such causal link cannot be provided for Mr.
4 Shafer's chest pain and abdominal pain. The Court agrees with Defendants that Mr. Shafer's
5 claim of anxiety and distress after learning that his filter had fractured is not supported by
6 adequate expert testimony, or indeed supported with any medical evidence. Faced with this,
7 Plaintiff's opposition brief fails to point to specific testimony or evidence supporting a more-
8 probable-than-not finding that a failure to warn or design defect proximately caused this injury.
9 As such, Mr. Shafer has failed to make a "sufficient showing on an essential element of [his]
10 case with respect to which [he] has the burden of proof," and therefore dismissal on summary
11 judgment is warranted. *See Celotex, supra.*

14 **IV. CONCLUSION**

15 Having reviewed the relevant briefing and the remainder of the record, the Court hereby
16 finds and ORDERS that Defendants' Motion for Summary Judgment, Dkt. #27, is GRANTED.
17 All of Plaintiff Shafer's claims are DISMISSED. The pending Motions in Limine, Dkts. #64
18 and #66, are STRICKEN AS MOOT. This case is CLOSED.

21 DATED this 4th day of October, 2021.

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25 RICARDO S. MARTINEZ
26 CHIEF UNITED STATES DISTRICT JUDGE
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